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IN THE

# Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, *ET AL.*,
*Petitioners*,

v.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK, *ET AL.*,
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

## Brief of Amici Curiae Public Citizen, Inc., Consumers Union, National Consumer Law Center, and the Campaign for Tobacco-Free Kids in Support of Respondents

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## QUESTION PRESENTED

Does a New York statute prohibiting merchants from imposing surcharges on customers who pay with credit cards violate the First Amendment?

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## INTEREST OF AMICI CURIAE[1]

Founded in 1971, amicus curiae Public Citizen, Inc., is a nonprofit consumer advocacy organization that appears on behalf of its nationwide members and supporters before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has long played a role in the development of commercial-speech doctrine. Public Citizen has defended commercial-speech regulations in cases where those regulations were important to protecting public health or served other important public interests, such as in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), and *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015). Its attorneys have also represented parties seeking to invalidate overbroad commercial-speech restraints that harmed competition and injured consumers, including in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

Consumers Union is the policy and mobilization arm of Consumer Reports, an independent, nonprofit organization that works side by side with consumers to create a fairer, safer, and healthier world. As the world's largest independent product-testing organization, Consumer Reports uses its more than 50 labs, auto test center, and survey research center to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae or their counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

subscribers to its magazine, website, and other publications. Consumers Union has been active over the years in numerous policy issues affecting consumer rights in the marketplace, including credit card fees and credit card surcharge bans.

National Consumer Law Center (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969 at Boston College School of Law, NCLC has been a resource center addressing issues such as illicit contract terms and charges, home improvement frauds, debt collection abuses, and fuel assistance benefit programs. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series, and members of its staff have served on the Federal Reserve System Consumer-Industry Advisory Committee and committees of the National Conference of Commissioners on Uniform State Laws, and acted as the Federal Trade Commission's designated consumer representative in promulgating important consumer-protection regulations.

The Campaign for Tobacco-Free Kids (CTFK) is a tax-exempt nonprofit corporation under section 501(c)(3) of the Internal Revenue Code, organized under the laws of the District of Columbia. CTFK works to reduce tobacco use and its deadly toll in the United States and around the world. CTFK engages in public education about the dangers of cigarettes, as well as advocating public policies and sponsoring activities to prevent kids from smoking, help smokers quit and protect everyone from secondhand smoke. CTFK has frequently participated as an amicus curiae in defense of the validity of state, local,

and federal regulations against attacks based on allegations that such regulations unconstitutionally infringe commercial speech, and it has a strong interest in ensuring that the ability of state, local and federal governmental agencies to protect the public health by appropriate regulation of the tobacco industry is not weakened.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief because petitioners' arguments that New York's ban on the imposition of credit card surcharges is a restriction on commercial speech that violates the First Amendment, if accepted, would create new and serious barriers to regulation in the interest of consumers. Petitioners' argument is but one example of the increasing use of First Amendment arguments as tools to challenge economic and regulatory policies that pose no real burden on expressive interests and that, to the extent they implicate speech at all, involve only commercial speech. The misuse of the First Amendment to undermine types of government activity that, since the *Lochner* era, have appropriately been subject to very limited scrutiny has two argumentative strands: first, the characterization of a regulation of commercial conduct as a restriction on speech; and second, the attempt to subject regulation of commercial speech to the strict scrutiny that has until now been reserved for laws affecting fully protected, non-commercial speech.

This case implicates both concerns. First, petitioners' argument that New York's surcharge prohibition is a speech regulation erases the line between protected speech and commercial conduct, and would

advance the creep of First Amendment analysis into the sphere of economic regulatory activity that is properly subject to only the most deferential judicial review. Second, petitioners' request that the Court treat the statute as a "content-based" speech restriction, together with the explicit argument of some of their amici that all such restrictions should be subject to strict scrutiny, threatens decades of this Court's precedents giving only limited protection to commercial speech against government regulation in the public interest. We therefore submit this brief to explain that the statute is not a speech restriction subject to First Amendment scrutiny, and to urge the Court to reject application of strict scrutiny to the statute even should the Court conclude that it does restrict speech.

Our arguments are not based on our views regarding the policies underlying New York's no-surcharge statute. This brief takes no position on whether the statute reflects sound policy. One of the amici joining this brief, Consumers Union, actively opposed such a ban when it was proposed in California, and might very well oppose such a ban again, on policy grounds, if the opportunity should arise as a result of a new proposal to enact or repeal a surcharge ban. Amici Public Citizen, NCLC, and CTFK have not taken formal positions on such statutes. All the organizations, however, are sensitive to concerns that bans on surcharges may perpetuate subsidization of credit-card users by cash purchasers and reduce economic incentives for card issuers and networks to reduce swipe fees. These policy concerns about New York's law are cogently expressed by a

number of petitioners' amici.[2] Such policy concerns, however, are properly matters for legislative judgment, not constitutional adjudication.

## ARGUMENT

### I. Prohibiting imposition of surcharges on credit-card users regulates conduct, not speech.

#### A. Imposing higher prices on particular purchasers is commercial conduct.

The statute challenged in this case provides succinctly that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. L. § 518. On its face, the provision is not, as petitioners characterize it, a "speech code." Pet. Br. 5. Nor is it, as one of petitioners' amici characterizes it, a speech restriction "disguised as a mere business regulation."[3] Rather, the statute is what it appears to be: a prohibition on imposing an additional charge on cardholders at the register when a seller has stated a standard price for an item.

As the Second Circuit explained, insofar as the statute might be applied to the conduct of petitioners, it provides that if a seller identifies only a single price for a product (what the court referred to as a

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[2] *See, e.g.*, Br. for Consumer Action & Nat'l Ass'n of Consumer Advocates as Amici Curiae in Support of Pet'rs; Br. of Amicus Curiae U.S. Pub. Interest Research Group Educ. Fund, Inc. in Support of Pet'rs (U.S. PIRG Br.).

[3] Br. of Amici Curiae First Amdmt. Scholars & First Amdmt. Lawyers Ass'n in Support of Pet'rs 4.

"single-sticker price"), the seller may not "charg[e] credit-card customers an additional amount above its sticker price that it is not charging to cash customers." Pet. App. 21a. Thus, the statute functions as a regulation of the pricing of goods and services, not as a regulation of speech.

Petitioners and their supporting amici do not appear to dispute the precedents holding that charging a price to a customer is commercial conduct, and that regulation of such conduct is subject only to the extremely limited judicial review generally applicable to economic regulation. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504–08 (1996) (plurality opinion); *Munn v. Illinois*, 94 U.S. 113, 125 (1876). As the First Circuit has put it, "price regulations and other forms of direct economic regulation do not implicate First Amendment concerns." *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 77 (1st Cir. 2013).

Regulation of prices does not implicate the First Amendment even though charging a price typically involves a communication to the buyer of the price being charged. As this Court has explained, "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct," and the "First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Thus, preventing a merchant from charging a credit-card holder $103 for an item marked $100 does not itself have any cognizable First Amendment impact, notwithstanding that it might also, incidentally, prevent the merchant from telling the consumer that she will be charged $103. In the

Second Circuit's words, "prices, although necessarily communicated through language, do not rank as 'speech' within the meaning of the First Amendment." Pet. App. 19a.

The United States argues that a law requiring merchants who post a single price to charge credit-card purchasers no more than that price should be treated as a regulation of speech because the requirement "addresses the *communication* of an otherwise-permissible pricing scheme rather than the pricing scheme *itself*." U.S. Br. 19. But the New York statute does not address communication any more than any price regulation inherently affects the communication of the price being charged. The United States' argument implies, for example, that a law prohibiting merchants from charging *any* purchaser more than a product's posted price would be a speech regulation on the theory that, had the merchant communicated a different price, it could lawfully have charged it. If accepted, the argument could even suggest that prohibitions on price-fixing are speech regulations because they address communications that affected the prices charged.

The consequences of the United States' position thus contradict the United States' proper recognition that "the government may attach legal consequences to speech without triggering First Amendment concerns." U.S. Br. 18. As the government acknowledges, contract law principles that prevent a person from charging more than the price stated in a contract are enforceable, although the higher price would have been lawful if it had been communicated in the contract. U.S. Br. 18. Just as "[a] law that simply requires a merchant to honor particular representations *if he chooses to make them* is properly

viewed as regulating economic conduct rather than speech," *id.*, a law that requires a merchant to honor standard posted prices *if he chooses to post them* regulates economic conduct, not speech.

### B. The New York statute addresses prices, not semantics.

Offering a different argument from that of the United States, petitioners assert that because the New York law does not prohibit merchants from offering *discounts* from standard prices to those who use forms of payment other than credit cards, the distinction it draws between what is lawful and what is unlawful is purely semantic. In other words, petitioners contend that, because the price consequence of a 3 percent credit card surcharge on a product priced at $100 is the same as that of a 2.9 percent cash discount on a product priced at $103—either way, a cash purchaser gets the product for $100 and a credit-card customer pays $103—the law is really regulating the way merchants describe their pricing, not regulating their conduct.

As the Second Circuit pointed out, however, the law does not turn on how merchants characterize their charges, but on whether they charge credit-card customers a higher price than a posted standard price:

> What Section 518 regulates—all that it regulates—is the difference between a seller's sticker price and the ultimate price that it charges to credit-card customers. A seller imposing a surcharge (an additional amount above its sticker price) on credit-card customers could choose to "characterize" that additional charge as whatever it wants, but that would not change the fact

> that it would be violating Section 518. Conversely, a seller offering a discount (a reduction from its sticker price) to cash customers could choose to "characterize" that reduction as whatever it wants (including as a "credit-card surcharge"), but that would not change the fact that the seller would *not* be violating Section 518.

Pet. App. 21a–22a.

In short, charging a customer *more* than a posted price is different conduct from charging her *less* than that price. Although the distinction between saying "I am charging you more than I am charging him" and saying "I am charging him less than I am charging you" may be semantic, the difference between charging someone a higher price than the one posted and charging someone a lower price than the one posted is not. Those two distinct forms of conduct also have different names—surcharges and discounts—but, as the Second Circuit noted, "the fact that these pricing schemes *have* different labels (and thus that sellers are likely to refer to them using different words) obviously does not mean that *all they are* is labels." Pet. App. 22a. The statute's application depends on a merchant's pricing conduct, not on how the merchant labels, characterizes, or explains it.

Accordingly, the statute is not like the commercial-speech restrictions that this Court has found to violate the First Amendment. It does not function by depriving customers of information. It does not prevent merchants from telling customers that their posted prices build in the costs of credit card usage or that customers are "*already* effectively paying sur-

charges in the form of higher base prices."[4] Nor does the statute prohibit merchants who discount their standard prices for non-credit purchasers (or employ "dual-pricing" systems involving separately marked cash and credit prices) from stating factually that credit-card users will pay more than cash purchasers, or from explaining the reasons for the differentials. A statute that prohibited such speech would properly be subject to review as a restriction on commercial speech. The New York statute, however, only prohibits merchants from *charging* credit-card purchasers prices that exceed stated standard prices. That prohibition does not implicate First Amendment concerns.

### C. The statute reflects economic regulatory policies that, whether wise or misguided, are subject to rational-basis review.

1. Many of the arguments against surcharge prohibitions rest on theories that, because of consumers' cognitive biases, surcharges may have more impact than discounts on consumer choices—and therefore on the incentives of merchants to offer different cash and credit prices, and ultimately on incentives for card issuers to cut swipe fees. That the impact of pricing behavior is mediated through consumers' cognitive biases, however, does not transform regulation of merchants' pricing *conduct* into regulation of speech. The different effects that petitioners and their amici ascribe to discounts and surcharges are not the result of limitations on what merchants may tell consumers about the consequences of credit-card fees; rather, those effects ap-

[4] U.S. PIRG Br. 8.

pear to be attributable to consumers valuing discounts less than they resent paying surcharges.[5]

That phenomenon is one of many that policymakers are entitled to consider in regulating commercial practices respecting credit card fees. Whether banning surcharges is good or bad public policy depends on judgments both about policy goals and about the likely effects of various policy options on consumer choices and merchant incentives. Legislators might choose, for example, to seek to reduce subsidization of credit-card users by cash purchasers; to deter (or encourage) credit-card use; to provide customers with motivation to push back against high swipe fees charged by card issuers and networks; and/or to enable consumers to engage in comparison shopping among cards with different swipe fees. Whether and to what extent particular policies, such as permitting surcharges, would achieve those goals might depend on how likely it was that merchants would risk the displeasure of card-using customers by instituting surcharges, whether surcharges would actually reduce prices paid by cash purchasers, and whether further regulation might be required to prevent excessive surcharges.[6]

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[5] See, e.g., Br. of Amicus Curiae Prof. Adam J. Levitin in Support of Pet'rs; Br. of Scholars of Behavioral Econ. as Amici Curiae in Support of Pet'rs.

[6] Some of the competing considerations are discussed in Fumiko Hayashi, *Discounts and Surcharges: Implications for Consumer Payment Choice*, Fed. Reserve Bank of Kan. City (June 2012), https://www.kansascityfed.org/publicat/psr/briefings/psr-briefingjune2012.pdf; Scott Schuh, Oz Shy & Joanna Stavins, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, Fed. Reserve Bank of Boston

(*Footnote continued*)

Such judgments about ends and means are appropriately within the province of legislatures, not courts. Choices of this nature, concerning the impacts of regulations of pricing and other commercial practices, are quintessentially matters of economic policy, having nothing to do with regulating speech. One need not endorse the choice New York has made to recognize that such choices should not be made by courts as an imperative of constitutional adjudication.

**2.** In the *Lochner* era, this Court struck down a number of economic regulatory measures as violative of broad notions of economic liberty. *See Lochner v. New York*, 198 U.S. 45 (1905). But in the modern era, in the 80 years since *Lochner*'s demise, this Court has strongly adhered to the principle that where regulations of economic activity are concerned, courts are "both incompetent and unauthorized" to second-guess "the wisdom of the policy adopted, [and] the adequacy or practicability of the law enacted to forward it." *W. Coast Hotel Corp. v. Parrish*, 300 U.S. 379, 398 (1937) (citation omitted).

This principle of judicial restraint quickly found expression in an appropriately deferential standard for evaluating the constitutionality of economic regulatory laws: "[R]egulatory legislation affecting ordinary commercial transactions is not to be pro-

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(Aug. 2010), https://www.bostonfed.org/-/media/Documents/Workingpapers/PDF/ppdp1003.pdf; Allen Rosenfield, *Point-of-Purchase Bank Card Surcharges: The Economic Impact on Consumers*, New America Found. (May 2010), https://na-production.s3.amazonaws.com/documents/point-of-purchase-bank-card-surcharges.

nounced unconstitutional unless ... it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). Under the rational-basis standard, courts may not "strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955). Even a statute that a court may view as "needless" and "wasteful" must be upheld if a legislature "might [have] thought" that it was "a rational way" to pursue some legitimate goal. *Id.* at 487–88.

The Court has repeatedly adhered to the view that review of economic regulatory measures under the rational-basis test "is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Dandridge v. Williams*, 397 U.S. 471, 486 (1970). Moreover, "States are not required to convince the courts of the correctness of their legislative judgments." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). Rather, "this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations," and accords States "wide latitude in the regulation of their local economies." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *accord, e.g., FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–15 (1993); *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174–79 (1980).

These limits on judicial review of economic regulation reflect recognition that the Constitution generally does not address matters of substantive economic policy, *see Ferguson v. Skrupa*, 372 U.S. 726, 731–32 (1963), as well as adherence to the boundaries between the institutional competencies of courts and legislatures. The deferential review of economic regulatory laws both preserves legislatures' "rightful independence" and "ability to function," *Beach Commc'ns*, 508 U.S. at 315 (citation omitted), and denies to the courts the unchecked authority of a "superlegislature." *Dukes*, 427 U.S. at 303. Adherence to those boundaries is an essential hallmark of the important but not unlimited role of courts in our democratic system.

Of course, when laws regulating economic activities employ suspect classifications or impinge on fundamental rights, rational-basis review gives way. *See Carolene Prods.*, 304 U.S. at 152 n.4. But calling a regulation of commerce a speech regulation does not make the "speech" label valid. As discussed above, the law at issue here regulates what merchants "must *do* ..., not what they may or may not *say*." *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 60 (2006). The Court should not lightly treat regulations of commercial conduct as regulations of commercial speech. Doing so threatens to erode the integrity of legislative authority and to entangle the courts in judgments about economic policy that they are ill-equipped to form and lack legitimate authority to make.

Petitioners assert that "[t]his case in no way threatens the bedrock proposition that states have broad authority to regulate economic conduct, unencumbered by the First Amendment," Pet. Br. 35, be-

cause the Court's decision will, they say, directly affect only a handful of credit-card surcharge laws. But the precedential impact of treating this regulation of commercial conduct—the imposition of a charge—as a regulation of speech would have far-reaching and potentially destabilizing effects on our democratic system, well beyond the particular facts of this case.

## II. If the Court decides First Amendment scrutiny is warranted in this case, the Court should apply its precedents concerning regulation of commercial speech.

As explained above, the New York statute does not regulate speech in any respect that implicates the First Amendment. But no party disputes that, to whatever extent the New York law might be deemed to implicate speech, the speech is nothing more than what this Court has described as "commercial speech" in a line of cases now dating back 40 years. The only "speech" that petitioners claim has been "regulated" here is speech stating the prices at which their goods and services are offered for sale to the public. Such speech falls squarely within the definition of commercial speech. *See 44 Liquormart,* 517 U.S. 484.

This Court first extended First Amendment protection to commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 762. Since then, the Court has repeatedly held that commercial speech receives less protection against regulation than noncommercial speech. Restrictions of commercial speech, even if content-based, are subject not to the strict scrutiny ordinarily applied to content-based restrictions on fully protected speech, but to a lesser, intermediate

scrutiny. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980). Moreover, disclosure requirements applicable to commercial messages are subject to an even more lenient standard of review, akin to the rational-basis test applicable to commercial regulation generally. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

Here, petitioners not only argue that New York's statute regulates speech and not conduct, but also hint that because it is in their view a content- and viewpoint-based regulation, Pet. Br. 33, it might be subject to strict scrutiny. *see* Pet. Br. 36. They argue, however, that the Court can strike down the law without applying such scrutiny because the law cannot survive "even" the intermediate scrutiny the Court has long used to evaluate restrictions on commercial speech under *Central Hudson*. *Id.*

Some of petitioners' amici do not pull their punches: They expressly call on the Court to use this case to dispense with *Central Hudson*'s intermediate scrutiny and impose strict scrutiny on all "content-based" commercial-speech regulations—that is, *all* commercial-speech regulations.[7] Should this Court determine that the statute is subject to any form of First Amendment analysis, it should reject the suggestion that strict scrutiny should apply and review the statute under the firmly grounded principles it has previously applied to commercial speech regulations in such cases as *Central Hudson* and *Zauderer*.

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[7] *See, e.g.*, Br. for Amici Curiae Ahold U.S.A., Inc., *et al.*, in Support of Pet'rs; Br. of Amici Curiae Cato Inst. & Pac. Legal Found. in Support of Pet'rs.

### A. To the extent the statute merely regulates disclosure of differential cash and credit-card pricing, it may be subject only to *Zauderer*'s rational-basis standard.

Having concluded that the New York law regulates speech, petitioners and their supporting amici jump directly to assessing it under standards of review applicable to prohibitions on speech. As the United States points out, however, U.S. Br. 14, 21–23, commercial-speech regulations that impose only disclosure requirements rather than prohibitions on speech are subject to a form of review considerably more deferential even than *Central Hudson*'s intermediate scrutiny: *Zauderer*'s rational-relationship standard. *See* 471 U.S. at 651.

Thus, before addressing whether some heightened form of scrutiny applies, this Court—if it were to accept the assertion that the statute regulates speech at all—should first consider the nature of the regulation involved here. The Second Circuit did not delve into that question, because it determined that the statute regulates conduct and not speech, and that issues about the statute's possible application to dual-pricing structures were not properly before the court. If this Court accepts the contention that the statute implicates the First Amendment, however, it cannot avoid addressing the nature of any regulation of speech that the statute imposes. As the United States points out, if the statute does regulate speech, the proper First Amendment analysis hinges on whether it merely requires that price differentials for cash and credit transactions be disclosed in particular ways (as the United States says was the case with the former federal statutory prohibition on surcharges, which the United States argues was con-

sistent with the First Amendment), or whether it actually imposes prohibitions on the way merchants may characterize their prices. U.S. Br 14–15, 23–35. If the statute merely regulates disclosure of price differentials, the proper First Amendment analysis would be the *Zauderer* standard.

*Zauderer* rests on a fundamental principle governing First Amendment review of commercial-speech regulations: The constitutionally protected interests implicated by commercial-speech regulations that involve disclosure are much less substantial than those implicated by prohibitions on commercial speech. Thus, while prohibitions on commercial speech are subject to a form of "heightened scrutiny"—under the intermediate scrutiny framework articulated in *Central Hudson*—commercial disclosure requirements are subject to rational-basis review, under which they are sustained if they are "reasonably related" to a legitimate government interest. *Zauderer*, 471 U.S. at 651.

This Court explained in *Zauderer* that this difference in standards of review rests on "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. *Zauderer* recognized that, outside the realm of commercial speech, laws compelling individuals to profess views on "'politics, nationalism, religion, or other matters of opinion'" raise the most fundamental First Amendment concerns. *Id.* at 651 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). But when commercial speakers are required to disclose information about their products or businesses, "the interests at stake ... are not of the same order." *Id.* "Because the extension of First Amendment protection to commercial speech is justified principally by

the value to consumers of the information such speech provides, [a commercial speaker's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id.*

Disclosure requirements are a preferred form of regulating commercial speech precisely because they "trench much more narrowly on an advertiser's interests than do flat prohibitions on speech." *Id.* These considerations led the Court in *Zauderer* to hold heightened scrutiny in any form inapplicable to requirements of factual disclosures in advertising, and to limit its review to the most deferential level of constitutional scrutiny. *Id.*

In *Zauderer*, and in the Court's later decision in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), the legitimate interest that sufficed to justify regulating disclosure was the "interest in preventing deception of consumers." *Id.* at 253; *Zauderer*, 471 U.S. at 651. But *Zauderer* did not limit its holding to cases where the government interest is related to protecting consumers against deception. The Court determined rational basis to be the appropriate level of review because commercial speakers have only a very minimal constitutionally protected interest in not disclosing factual information about their products, services or businesses. *Zauderer*'s reasoning thus suggests that it applies more broadly, and that whenever a law "requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech[.]" *44 Liquormart*, 517 U.S. at 501 (plurality).

Application of *Zauderer* necessitates analysis of what form of disclosure the statute requires and whether that disclosure could be viewed as rationally related to some government interest in protecting consumers. Because the Second Circuit did not perform such an analysis, and additional evidence may be required to make the proper determination, a remand is appropriate, as the United States recommends, if the potential problem with the statute relates to disclosure requirements.

### B. If deemed a commercial-speech prohibition, the no-surcharge statute would be subject to intermediate scrutiny.

Whether analyzed as a regulation of commercial conduct or as a regulation of the manner in which prices are disclosed, New York's surcharge prohibition is subject only to minimal, rational-basis judicial scrutiny. But even if the Court were to accept petitioners' assertion that prohibiting surcharges is properly viewed as prohibiting commercial speech about price differentials, the New York law would be subject only to intermediate scrutiny.

#### 1. This Court has long applied intermediate scrutiny to content-based commercial-speech regulations.

The First Amendment standard that applies to restrictions on commercial speech is firmly established: The government may restrict such speech where it has "substantial" interests in the regulation, the regulation "advances these interests in a direct and material way," and "the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (citing *Cent. Hudson*, 447 U.S. at 564).

This standard affords less protection for commercial speech than the strict scrutiny ordinarily applicable to fully protected speech, such as political, literary, artistic or religious expression. This "common-sense distinction" between commercial and noncommercial speech stems from commercial speech's "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978) (internal quotation marks omitted).

Certain of petitioners' amici contend that the New York statute restricts the "content" of a merchant's speech about prices, and that the Court therefore should apply the strict scrutiny normally applicable to content-based restrictions on fully protected speech. Those amici argue that content-based restrictions on commercial speech should be treated the same as content-based restrictions on speech about religious or political views. But as this Court's decisions recognize, "regulation of commercial speech based on content is less problematic" than content-based regulation of noncommercial speech. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983). The Court has explained that "regulation of [commercial speech's] content" is permissible in part because such "speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" *Cent. Hudson*, 447 U.S. at 564 n.6 (citation omitted).

The argument for strict scrutiny of content-based commercial-speech regulations also runs counter to a long line of cases in which this Court has consistently applied intermediate scrutiny to restrictions on the content of lawful, non-misleading commercial speech. *See, e.g., Greater New Orleans Broad. Ass'n,*

*Inc. v. United States*, 527 U.S. 173, 176, 183–84 (1999) (striking down a statute that forbade broadcast advertising of casino gambling, as applied to advertisements in jurisdictions where such gambling was legal); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478, 482, 488 (1995) (invalidating federal law that prohibited beer labels from displaying alcohol content); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620, 635 (1995) (upholding rule prohibiting attorneys from sending certain written solicitations to accident or disaster victims); *Bolger*, 463 U.S. at 61, 68–69 (holding unconstitutional as applied a statute that prohibited unsolicited advertisements for contraceptives); *In re R.M.J.*, 455 U.S. 191, 194, 205–07 (1982) (holding unconstitutional a rule that barred attorney advertisements from identifying jurisdictions in which attorneys were licensed). In each case, the restrictions turned on the "subject matter" of the speech and the identity of the speaker. Yet in each case, the Court held that the restrictions were subject only to intermediate scrutiny.

Indeed, *Central Hudson* itself struck down a regulation that banned all "advertising intended to stimulate the purchase of utility services," an overtly content- and viewpoint-based restriction. *Cent. Hudson*, 447 U.S. at 559 (internal quotation marks omitted). Thus, the argument for strict scrutiny of content-based commercial-speech restrictions posits that the Court applied the wrong standard in the very case that gave First Amendment intermediate scrutiny its name.

### 2. *Sorrell* and *Reed* do not alter the intermediate scrutiny standard for restrictions on commercial speech.

The argument for strict scrutiny hinges on this Court's recent decisions in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *Sorrell v. IMS Health*, 564 U.S. 552. Those decisions, however, do not step back from the Court's well-established distinction between commercial and noncommercial speech, even for restrictions that are content-based.

In *Sorrell*, the Court struck down on First Amendment grounds a Vermont law that prohibited, with limited exceptions, "pharmacies, health insurers, and similar entities from disclosing or otherwise allowing prescriber-identifying information to be used for marketing" and "pharmaceutical manufacturers and detailers from using the information for marketing." *Id.* at 563. The Court held that the law imposed a "speaker- and content-based burden on protected expression," *id.* at 571, by allowing the use of information by other entities, such as "private or academic researchers," and for non-marketing purposes, such as "educational communications." *Id.* at 563–64. The Court therefore concluded that "heightened judicial scrutiny is warranted." *Id.* at 565.

Importantly, however, the Court went on to reaffirm that there are two forms of "heightened" scrutiny that may apply to content-based speech restrictions: "a special commercial speech inquiry or a stricter form of judicial scrutiny" for noncommercial speech. *Id.* at 571. The Court concluded that it was unnecessary to decide whether the speech at issue was commercial or noncommercial because, even under the less stringent "commercial speech inquiry,"

the law was unconstitutional. *See id.* at 571–72 (citing *Cent. Hudson*, 447 U.S. at 566). Far from announcing a new rule, *Sorrell*'s repeated distinction between the review standard for commercial speech and the "stricter" standard for noncommercial speech supports the continued application of intermediate scrutiny to commercial speech.

As the *Sorrell* opinion makes clear, the phrase "heightened scrutiny" does not refer to strict scrutiny. *Sorrell*'s application of intermediate scrutiny contradicts any such reading, and many of the Court's other opinions demonstrate that "heightened scrutiny" is a *generic* term indicating a level of scrutiny higher than rational-basis scrutiny, including both intermediate scrutiny and strict scrutiny. For example, the Court's equal protection precedents frequently use the term "heightened scrutiny" to describe the intermediate scrutiny applicable to gender classifications. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533, 555 (1996); *Clark v. Jeter*, 486 U.S. 456, 463, 465 (1988). In the First Amendment area, the Court has likewise referred to the intermediate scrutiny applied to limits on political contributions as a form of "heightened judicial scrutiny." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). The Court's opinion in *Sorrell* uses the term "heightened scrutiny" in the same way—as a general description of scrutiny beyond a rational-basis test—not as another way of saying strict scrutiny.

Nor does *Reed* offer any support for application of strict scrutiny to commercial-speech regulations. *Reed* struck down a local law that prohibited outdoor signs without a permit but exempted twenty-three categories of signs, including political and ideological signs and temporary directional signs of short dura-

tion. *See* 135 S. Ct. at 2224–25. The law did not, however, exempt signs that the plaintiffs—a church and its pastor—sought to display for more extended periods to publicize the time and location of upcoming church services. *Id.* at 2225. The Court cited noncommercial-speech cases for the proposition that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226. The Court cited *Sorrell*, a commercial-speech case, only in defining the "commonsense meaning of the phrase 'content based.'" *Id.* at 2227. The Court explained that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* (citing *Sorrell*, 564 U.S. at 565). The Court thus found that the town ordinance in *Reed* was content-based because it "single[d] out specific subject matter for differential treatment." *Id.* at 2230. The Court then applied strict scrutiny to the ordinance as a content-based regulation of noncommercial speech. *Id.* at 2231.

Critically, *Reed* did not hold—or even discuss the possibility—that strict scrutiny would apply to content-based *commercial-speech* restrictions. Surely if the Court intended to overrule its many decisions distinguishing commercial speech from noncommercial speech, its opinion would have acknowledged such a momentous decision. *Reed* does not do so. Indeed, the Court's opinion does not use the term "commercial speech" even once.

Likewise, to the extent that New York's law might be viewed as regulating the way differences in

cash and credit prices are disclosed, *see supra* at 17–20, neither *Reed* nor *Sorrell* suggests retreat from *Zauderer*'s standard of review for content-based commercial-speech disclosure requirements. Neither case involved disclosure requirements, and neither opinion mentions *Zauderer*, let alone alters the standard of review for disclosure requirements. *Sorrell* and *Reed* plainly did not silently overrule *Zauderer*.

### 3. Applying strict scrutiny to content-based commercial-speech regulations is neither necessary nor proper.

The view that content- or speaker-based commercial-speech restrictions are subject to strict scrutiny would have exceptionally far-reaching implications, because commercial-speech restrictions are always, or virtually always, content- or speaker-based in the broad, general sense in which the Court has used the term in *Reed* and *Sorrell*. Commercial-speech restrictions, by definition, apply to commercial messages and commercial speakers, and usually to particular types of speakers and messages (for example, the written solicitations from attorneys that were at issue in *Went for It*, *see* 515 U.S. at 620). More broadly, "the classification of speech between commercial and noncommercial is itself a content-based distinction." *CTIA—The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061 n.9 (N.D. Cal. 2015), *app. filed*, No. 16-15141 (9th Cir. Feb. 1, 2016). As one scholar has observed, "this argument, that a statute which treats marketing differently than other speech, is constitutionally infirm *on that ground*, makes a hash of the commercial-speech doctrine because, by definition, the commercial-speech doctrine is applicable only to a specific type of content—

commercial content." Tamara Piety, *The First Amendment and the Corporate Civil Rights Movement*, 11 J. Bus. & Tech. L. 1, 20 (2016).

Similarly, commercial-speech disclosure requirements are necessarily content- and speaker-based in the broad, general sense in which petitioners and their amici use those terms. That is, they are triggered by advertisements or other commercial speech with specific content, made by particular types of speakers. In *Zauderer*, for example, the disclosure requirement applied only to particular speakers (attorneys) and only to speech with particular content (advertisements mentioning contingent-fee representation). *See* 471 U.S. at 650. Such content- and speaker-specificity is an inherent feature of commercial-speech disclosure requirements: It would make no sense, for example, to require companies advertising shoes to warn that smoking cigarettes causes cancer. Likewise, cigarette companies are not required to include warnings about the dangers of sugary drinks in their advertisements, and soft-drink advertisements need not disclose EPA-estimated miles-per-gallon figures for cars. Thus, if content- and speaker-based commercial disclosure requirements were subject to heightened scrutiny, all disclosure requirements would have to face such scrutiny, and *Zauderer* would be a dead letter.

**a. Applying strict scrutiny to commercial speech would threaten a broad range of commonsense regulations.**

Applying strict scrutiny to content-based commercial-speech restrictions—in addition to making a mess of the case law—would risk devastating consequences for the government's ability to adopt com-

monsense marketplace regulations. Regulations of commercial speech typically apply to specific market participants, such as food manufacturers, debt collectors, or drug companies, and they deal with problems unique to industries in which those participants operate. For example, federal law limits the circumstances in which food manufacturers can make claims about health benefits of their products, 21 C.F.R. § 101.14, or advertise the addition of vitamins to infant formula, *id.* § 107.10(b). It forbids debt collectors from advertising the sale of a debt to coerce a debtor to pay it, and from publishing lists of consumers who refuse to pay debts. 15 U.S.C. § 1692d(3)–(4). If content-based commercial-speech restrictions are subject to strict scrutiny, all these restrictions might have to satisfy such scrutiny, on the theory that they apply "to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227.

In the disclosure context, too, the government frequently mandates speech on a particular subject and requires that commercial actors use specific language. For example, vehicle manufacturers must label, in accordance with Environmental Protection Agency rules, each vehicle with its average miles per gallon of fuel. 49 U.S.C. § 32908(b). Drug manufacturers must include "black box" warnings on labels of certain drugs to emphasize particular hazards. 21 C.F.R. § 201.57. And food manufacturers must disclose nutritional information about their products. *Id.* § 101.9.

The government would have a much higher burden to justify basic rules like these if they were subjected to strict scrutiny. It "is the rare case" in which the government "demonstrates that a speech re-

striction is narrowly tailored to serve a compelling interest," as required to satisfy strict scrutiny. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665–66 (2015) (citation omitted). Indeed, in the noncommercial-speech context, the Court has described content-based restrictions as "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Applying strict scrutiny to content-based commercial-speech restrictions could obliterate many laws and regulations that are longstanding and critical to the protection of consumers. The crippling effects would be even more far-reaching if the notion of what is "content-based" were conceived as broadly as petitioners and their amici propose.

**b. Applying strict scrutiny to commercial speech would harm protection of pure speech and is unnecessary to protect commercial speech.**

Applying strict scrutiny to content-based commercial-speech restrictions could also unnecessarily create unintended, harmful consequences for the protection of religious, political, literary, artistic and other noncommercial speech at the heart of the First Amendment. "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U.S. at 456. That is, if strict scrutiny were applied to commercial-speech regulations—including fundamental protections on which the public has depended for decades—the inclination of courts to uphold sensible marketplace rules might lead them to relax strict First Amendment scrutiny as we know it, to the detriment of speakers engaged

in the kinds of fully protected expression that undergird American liberty and democracy.

That result would be all the more unfortunate because application of strict scrutiny is not necessary to curb any actual government excesses in the realm of commercial speech. *Central Hudson* intermediate scrutiny is already quite protective, perhaps in some cases overly protective, of commercial-speech interests. For example, in this case, assuming that the statute were deemed to prohibit speech, it could be sustained under *Central Hudson* only if the interests identified by the state are not only legitimate, but also "substantial," and if the statute advances them "directly" and in a "reasonabl[y] proportion[ate]" way. *Edenfield*, 507 U.S. at 767. As demonstrated by petitioners' brief, and that of a number of its other amici who do not advocate strict scrutiny,[8] the prohibition on surcharges may be difficult to support if it must survive any degree of heightened scrutiny. Thus, should the Court conclude that the New York statute imposes commercial-speech prohibitions, it should expressly reaffirm that the *Central Hudson* test is the appropriate standard of review for such restrictions, and should assess the law under that test.

## CONCLUSION

Whatever the merits of New York's ban on credit surcharges as a matter of policy—and they are dubious—the Second Circuit correctly concluded that the ban regulates commercial conduct, not speech. Because petitioners make no claim that the law lacks

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[8] *See, e.g.*, U.S. PIRG Br.

the rational basis required to sustain an economic regulatory measure, the Second Circuit's judgment should be affirmed.

If the Court nonetheless concludes that the statute does regulate speech in some cognizable fashion, it should assess the statute under *Zauderer*'s rational-relationship standard to the extent the statute merely regulates disclosure—or should remand for consideration of that issue.

Finally, if the Court were to conclude that the statute actually embodies some prohibition on protected commercial speech, it should hold that the statute is subject to review under *Central Hudson*'s intermediate scrutiny standard.

Respectfully submitted,

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